IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION.

SECOND APPEAL NO.1059 OF 2005
Along with
Civil Application No.1578 of 2005

Mr Abdul Raheman Ahmadali Inamdar,
Aged 62 years, Occu.: Business,
R/at & Post -Manchar, Tal.Ambegaon,
Dist: Pune (Near Old Pune-Nashik Rd.).. Appellant.
(Orig.Deft)

Vs

Mr. Dagadu Manjaba Bende,
Age 50 years, Occ: Labour,
At & Post Manchar,
Tal.Ambegaon,
District-Pune. .. Respondent.
(Orig.Plff)

Mr V.G.Peshave, for the appellant.
Mr S.D.Patil a/w Mr P.P.Jadhav, for the respondent.

CORAM : D.B.BHOSALE,J.
DATE : 24.01.2007

PC:

1. Mr Peshave, learned counsel for the appellant, has raised a question as to whether, in the facts and circumstances of this case, section 53-A of the Transfer of Property Act, 1882 provides protection to the appellant who in part performance of the contract had taken possession of the suit property even after his suit for specific performance stood dismissed for default. In other words, he submitted that in the facts and circumstances of this case, the provisions of

Section 53-A operate as shield and protects possession of the appellant as purchaser.

2. The appellant was inducted as a tenant in the suit premises much prior to 1981. On 1.5.1982, an agreement for sale was executed by the respondent in favour of the appellant. The appellant had paid Rs.5,000/- as earnest money. In the document it was specifically mentioned that he was put in possession by virtue of that agreement, meaning thereby the character of possession was changed from lessee to owner. On 26.4.1985 the appellant filed a suit for specific performance of the agreement. The suit was dismissed for default on 18.2.1991. There is a controversy between the parties over the compromise out of court, since according to the appellant, in view of the compromise the remaining amount of the consideration was paid and the transaction was completed and that is how he became owner of the property. On 4.9.1992, the respondent issued a notice of termination of tenancy on the ground of default. The notice was received by the appellant on 12.9.1992. The notice was admittedly not replied by the appellant. Thereafter, on 7.11.1992, the respondent instituted a suit for eviction. The trial Court, vide its judgment and order dated 3.5.2001 decreed the suit and the appeal court, vide its judgment

and order dated 3.1.2005, dismissed the appeal filed by the appellant and hence this second appeal under section 100 of the Civil Procedure Code.

3. Mr Peshave, learned counsel for the appellant, placed heavy reliance upon the judgment of the Apex Court in Mahadeva and others Vs. Tanabai, AIR 2004 S.C. 3854 and the judgment of this Court in Sakharam Laxman Mathane Vs Laxman Bahiru Dige, 2006(4) AIR Bom R.450, to contend that in any case there cannot be a decree of eviction against the appellant since he was put in possession as a part performance of the agreement. To my specific query made to Mr Peshve as to whether even after dismissal of the suit for specific performance filed by the appellant, his possession stands protected under section 53A of the Transfer of Property Act, he submitted that under any circumstances once having put a transferee in possession of the property by virtue of the agreement to sell, there cannot be a decree of eviction at all and his possession stands protected for ever irrespective of the fact that whether he performed his part of the contract or not, or whether the suit for specific performance was dismissed.

4. On the other hand, Mr Sandesh Patil, learned counsel for the respondent, placed heavy reliance upon

the judgment of the Supreme Court in D.S.Parvathamma Vs. A Srinivasan, (2003) 4 Supreme Court Cases 705 and submitted that in any case the appellant cannot be said to have had performed or was ready and willing to perform his part of the contract. He then submitted that the appellant was not put in possession in pursuance of the contract but he was already in possession as a tenant of the suit premises. He invited my attention to the judgments of the courts below to contend that the respondent had not received the remaining consideration and, therefore, it cannot be said that the appellant was ready and willing to perform his part of the contract. The respondent has disputed the so-called compromise out of court during pendency of the suit filed by the appellant for specific performance of the agreement. He then submitted that the judgment cited by the learned counsel for the appellant will not apply to the facts of the present case since in those cases no suit was brought for specific performance of the agreement for sale by the defendant therein. My attention was also invited to the judgment of the Full Bench of this Court in Sadashiv Chander Bhamgare Vs Eknath Pandharinath Nangude, 2004(3) BCJ 56, to contend that the conditions before a transferee becoming entitled to claim protection of the provisions of section 53-A, were not satisfied and in particular

condition nos.(v) and (vi) in paragraph 6 of the judgment.

5. From perusal of the judgment of this Court in Sakharam Lathane Vs, Laxman (supra), though in that case also the suit for specific performance was dismissed for default, it cannot be overlooked that in that case admittedly full consideration amount, as agreed between the parties, was paid. That is not the case in the present appeal. In our case, balance consideration amount, though the appellant claims that it was paid, was held to be not paid. The payment of the entire consideration has a direct impact on the issue of readiness and willingness. The readiness and willingness, in the present case, will have to be seen in the light of the fact that the suit filed by the appellant for specific performance of the agreement had been dismissed for default and no steps whatsoever were taken by the appellant for getting it restored and prosecuting those proceedings further. Similarly, in Mahadeo Vs. Tanabai (supra), though for 37 years no steps were taken either by the plaintiff or by the defendant, it is clear that the issue of readiness and willingness was answered in favour of the petitioner and, secondly, the suit for specific performance filed

by the transferee was dismissed as barred by limitation and, therefore, the Supreme Court held that by itself is not enough to deny the benefit of the plea of part performance of agreement of sale to a person in possession. On facts this judgment also does not apply for the similar reasons recorded above.

6. It is now well settled that a person claiming the benefit of part performance under section 53-A must always be shown to be ready and willing to perform his part of the contract. And if it is shown that he was not ready and willing to perform his part of the contract he will not qualify for the protection of the doctrine of part performance. Similarly, it is also necessary, as observed by the Supreme Court in D.S.Parvathamma (supra), that unless the following three conditions are fulfilled one cannot raise a plea of part performance: (a) it was admitted that the transferee had taken possession over the property in part performance of the contract, (ii) that the transferee had not brought any suit for specific performance of the agreement to sell, and (iii) the transferee was always and still ready and willing to perform his part of the contract. Insofar as the second requirement is concerned in the present case, it does not stand complied with since admittedly the suit was filed by the

appellant for specific performance of the agreement to sell was dismissed. Merely because the suit was dismissed for default and not decided on merits will not make any difference since fact remains that the order of dismissal of the suit attained finality. Admittedly, after dismissal of the suit for default the appellant did not prosecute the proceedings further and in the circumstances, on this count alone his plea of part performance deserves to be rejected. Similarly, looking to the facts and circumstances of the case, it cannot be said that the transferee was always and still ready and willing to perform his part of the contract. He did not express his readiness and willingness during pendency of the proceedings and on this ground also, the plea of part performance deserves to be rejected. The Full Bench of this Court in Sadashiv C.Bhamgare (supra) has observed that the purpose behind section 53-A is thus to provide a shield of protection to the proposed transferee to remain in possession against the original owner who has agreed to sell the land to the transferee if the proposed transferee satisfies other conditions of section 53-A. That protection is available to the transferee as a shield against the transferor and would disentitle the transferor from disturbing the possession of the proposed transferee who is put in possession pursuant to such agreement. The appellant in the

present case having been lost his opportunity to seek performance of the contract, he cannot claim to be proposed transferee and, therefore, it is now not open for the appellant to seek specific performance of the contract. If the contention of Mr Peshve, learned counsel for the appellant, that under any circumstances a transferee, such as the appellant, having been inducted in the premises in part performance of the contract even if the suit is dismissed he stands protected under section 53-A forever and in any case he cannot be evicted from the suit premises is atrocious. In that case, every such transferee without performing his part of the contract can sit on the property and deprive the original owner permanently. That is not the purport of the judgments of the Supreme Court. In the circumstances, the only contention advanced by Mr Peshave, learned counsel for the appellant, must be rejected. This second appeal accordingly dismissed in limine. As a consequence thereof, the civil application is disposed of.

7. At this stage, Mr Peshave, learned counsel for the appellant, seeks twelve weeks time to vacate the suit premises. Mr Sandesh Patil, learned counsel for the respondent, has no objection for granting eight weeks time as prayed for by Mr Peshave. In view of the

submissions of the learned counsel for the parties, I pass the following order. The appellant is allowed to vacate the suit premises within twelve weeks from today subject to filing of an usual undertaking in this court within a period of four weeks from today with an advance copy of the undertaking to the advocate for the respondent. Granting of time to vacate and filing of the undertaking shall not curtail the right of the appellant to challenge this order in the Apex Court, if he so desires. If the appellant fails to file an undertaking as aforestated, it will be open for the respondent to execute the decree.

(D.B.BHOSALE,J.)